

NTSB Order No. EA-4286

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

Respondent .

Docket SE-12944

¹An excerpt from the hearing transcript containing the initial decision is attached.

Aviation Regulations ("FAR," 14 C.F.R. Part 91).² The law judge then modified the sanction from a 270-day suspension of respondent's commercial pilot certificate to a \$5,000 civil penalty. It is from the sanction modification that the Administrator appeals.³ As discussed below, we grant the Administrator's appeal and reinstate the 270-day suspension of respondent's pilot certificate.

²**§ 91.303 Aerobatic flight.**

No person may operate an aircraft in aerobatic flight-

* * * *

(d) Below an altitude of 1,500 feet above the surface....

§ 91.307 Parachutes and parachuting.

* * * *

(c) Unless each occupant of the aircraft is wearing an approved parachute, no pilot of civil aircraft carrying any person (other than a crewmember) may execute any intentional maneuver that exceeds-

(1) A bank of 60 degrees relative to the horizon....

§ 91.319 Aircraft having experimental certificates: Operating limitations.

(a) No person may operate an aircraft that has an experimental certificate-

(1) For other than the purpose for which the certificate was issued....

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator filed a brief on appeal, to which respondent replied. Respondent neither appealed the law judge's decision, nor made any argument to the Board that the suspension sought by the Administrator was unjustified.

In his suspension order, which served as the complaint, the Administrator alleged that, on May 16, 1992, near Clinton Field, Wilmington, Ohio, respondent acted as pilot-in-command of a North American P-51D in aerobatic flight,⁴ below an altitude of 1,500 feet, without a current letter of authorization and in contravention of the Special Airworthiness Certificate operating limitations, and with a passenger on board who did not have a parachute when respondent executed maneuvers that exceeded a 60-degree angle of bank relative to the horizon.

At the hearing, respondent admitted to all the allegations except operating the P-51D without authorization. By way of explaining his conduct, respondent testified that, although he had not planned to do acrobatic maneuvers, his passenger was so enthusiastic, asking respondent repeatedly to execute a roll, that he gave in.⁵ Respondent believed there had been no danger involved since no traffic was around him when he performed the maneuvers and he had skillfully performed at many airshows in the past.

The law judge found that the allegations as set forth in the complaint were proven by a preponderance of the evidence, and respondent's operation of the aircraft was careless because it placed respondent and his passenger in danger. Nevertheless, he

⁴The record interchangeably uses the terms aerobatic and acrobatic, as do the briefs of the parties and the pertinent case law.

⁵Respondent stated that he executed one 4-point roll; the Administrator's witness testified that she saw a total of three.

further determined that the passenger's enthusiasm caused respondent to get "caught up in the excitement of the moment" and perform an acrobatic maneuver that had been executed with skill.

(Initial decision at 179.) The law judge then concluded that respondent's action was inadvertent. Taking into consideration that respondent utilizes his certificate in his propeller repair and aircraft restoration business where he employs several people, the law judge modified the sanction from the 270-day suspension sought by the Administrator to a \$5,000 civil penalty.

On appeal, the Administrator argues that the sanction was modified in error because 1) respondent's conduct posed a potentially serious threat to the lives and property of others; 2) a significant suspension would be a more effective deterrent than a civil penalty; 3) contrary to the law judge's determination, respondent's actions were not inadvertent; 4) respondent has a violation history;⁶ and 5) Board precedent supports the imposition of a lengthy suspension in similar cases.

The Administrator maintains that although the law judge is empowered to modify a sanction from a suspension to a civil penalty, the civil penalty imposed here is not commensurate with the violations proved. At the hearing, counsel for the Administrator referenced the FAA's written sanction guidelines as

⁶Evidence was presented at the hearing indicating that respondent had paid a \$3,000 civil penalty in April 1993, stemming from a situation where, in August 1989, he transported two passengers in the P-51 even though the aircraft has seating for only two persons (including the pilot). (Transcript (Tr.) at 71, 140-41; Exhibit (Ex.) R-7.)

follows: exceeding operating limitations, 30 to 90-day certificate suspension; acrobatic flight without a parachute for the passenger, 60 to 90 days; acrobatic flight below minimum altitude, 90 to 180 days; careless or reckless operations, 30 to 90 days. (Tr. at 156.) As for Board precedent involving unlawful acrobatic flight, suspensions have generally ranged between 30 and 180 days, depending on the circumstances of each violation, although revocation has been imposed in the most serious cases.⁷

The Administrator especially relies on Administrator v. McClellan, 5 NTSB 2217 (1987), where the Board upheld the law judge's modification of a revocation order to a 180-day suspension of the respondent's airline transport pilot certificate for his performance of an aileron roll and loop over an airport, at an altitude below 1,500 feet, with passengers on board who did not have parachutes. A crash-landing occurred, causing injury and property damage. The Administrator argues that the instant case is more egregious than McClellan because

⁷See Administrator v. Swift, NTSB Order No. EA-4122 (1994)(90 days for performing aerobatics below an altitude of 1,500 feet) and cases cited therein at n. 10; Administrator v. Stricklen, NTSB Order No. EA-3814 (1993)(revocation for performing an acrobatic roll on a Part 135 scheduled flight); Administrator v. Couch, NTSB Order No. EA-3655 (1992)(30 days for 90 degree bank upon takeoff); Administrator v. Haney, NTSB Order No. EA-3202 (1990)(revocation upheld where respondent performed aerobatic rolls contrary to the aircraft's flight manual on four separate flights over a one-year period); Administrator v. McClellan, 5 NTSB 2217 (1987)(180 days); Administrator v. Van Dusen, 2 NTSB 2479 (1976)(90 days for loops performed during two flights, below 1,500 feet, while passengers did not have parachutes).

respondent also operated the aircraft with an experimental certificate for other than the purposes for which the certificate was issued, and has a prior civil penalty fine. He contends that a \$5,000 penalty would not provide a sufficient deterrent to future misconduct in this situation.⁸

The record substantiates the Administrator's assertion (and the law judge's finding) that respondent carelessly put himself and his passenger in danger. Martha Lunken, an FAA operations inspector and accident prevention program manager at the Cincinnati Flight District Standards Office (FSDO), testified that, while attending a "war bird fly-in" at Clinton Field on May 16, 1992, she saw a P-51 fly over the airport at low altitude and execute a roll. (Tr. at 33.) Later that afternoon, she saw the P-51 fly over the runway at low altitude performing a roll. The aircraft then circled the field, came in below 500 feet over the runway and executed another 4-point roll. (Tr. at 35-36.) There were many people and airplanes on the field at the time. Id. When the aircraft landed, she spoke to respondent and his passenger. Respondent admitted performing a roll below 1,000 feet, but stated that he did so in a safe, proficient manner, he was not near the crowd, and he checked that there was no traffic nearby. (Tr. at 134-35.) He also admitted that his passenger did not have a parachute.

⁸The Administrator asserts that a \$5,000 fine would not serve as a deterrent to someone who could afford to indulge in the hobby of restoring and maintaining a P-51. An operational P-51, as attested to by respondent, sells for between \$400,000 and \$500,000. (Tr. at 143.)

We disagree with the law judge's conclusion that respondent's alleged violations were inadvertent. To the contrary, respondent appears to concede that he knew he could not lawfully perform a roll under the circumstances alleged by the Administrator, but nevertheless chose to perform one because he "got caught up" in his passenger's enthusiasm. Moreover, we disagree with the apparent belief that respondent's skill and proficiency as an airman somehow render his lack of judgment, evidenced by his performance of a prohibited maneuver, less serious. That respondent is an experienced airman does not negate his careless action.

As for the effect suspension would have on respondent's business, we, again, cannot agree with the law judge's assessment. He apparently placed great emphasis on the fact that respondent, as sole owner of an FAA-certified repair station including a propeller shop and a shop for rebuilding airplanes, employs 12 people who rely on him for their livelihood and that respondent is the only person who test-flies the aircraft. (Initial Decision at 180.)⁹ Assuming, for purposes of argument, that this factor was relevant to the issue of sanction, the law judge's reliance on this information is misplaced, in that a suspension of respondent's airman certificate does not automatically put his employees out of work. Respondent may hire

⁹Respondent testified that he has to test-fly a rebuilt aircraft about once every one to two months, and that he is the only one at the shop who does so. (Tr. at 111-12.) He also testified that he transports propellers for repair. (Tr. at 113.)

a qualified pilot to test-fly the aircraft or may transport the propellers by other means.

In sum, we think, especially in light of respondent's recent violation history, that the law judge erred in concluding there was justification for modifying the sanction sought by the Administrator.¹⁰ The modification will therefore be reversed.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is affirmed, insofar as it sustained the violations alleged by the Administrator, and reversed insofar as it modified the sanction in the Administrator's order of suspension;
3. The Administrator's order of suspension is affirmed; and
4. The 270-day suspension of respondent's airman certificate shall begin 30 days after service of this order.¹¹

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

¹⁰It is well settled that a respondent's violation history has a bearing on sanction. See, e.g., Administrator v. Mears, 2 NTSB 1943 (1975). Here, respondent committed the instant violations while the legal process was still ongoing regarding his prior civil penalty, and the Administrator rightfully considered that to be a critical factor in assessing sanction. See Administrator v. Selliken, 5 NTSB 1134 (1986)(respondent committed second violation soon after receiving the Notice of Proposed Certificate Action for the first. Each incident would have warranted a suspension of up to 180 days, but given the circumstances, revocation was appropriate).

¹¹For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).